

July 10, 2009

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

400 Yesler Way, Room 404
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-1654
Email hearingexaminer@kingcounty.gov

REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E0400741**

LAURIE WEAVER
Code Enforcement Appeal

Location: 20515 Northeast Union Hill Road

Appellant: Laurie Weaver
represented by **William Crittenden**, Attorney
927 North Northlake Way, Suite 301
Seattle, Washington 98103
Telephone: (206) 361-5972

Intervenors: Colette and **David Kress**
20450 Northeast 71st Street
Redmond, Washington 98103

King County: Department of Development and Environmental Services (DDES),
represented by Erroll Garnett
900 Oakesdale Avenue Southwest
Renton, Washington 98055
Telephone: (206) 296-7102
Facsimile: (206) 296-6644

and

King County Prosecuting Attorney's Office
Jina Kim, Deputy Prosecuting Attorney
516 – 3rd Avenue, Room W400
Seattle, Washington 98104
Telephone: (206) 296-9015
Facsimile: (206) 296-0191

SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal with revised compliance schedule
Department's Final Recommendation:	Deny appeal with revised compliance schedule
Examiner's Decision:	Grant appeal in part; deny in part with further revised compliance schedule

EXAMINER PROCEEDINGS:

Prehearing conferences:	November 22, 2005
	December 14, 2005
	March 7, 2006
	August 28, 2006
Hearing opened:	January 8, 2007
Hearing continued to:	January 10, 2007
	January 29, 2007
	February 12, 2007
Summary dismissal motion hearing:	March 22, 2007
Reconvened hearing conference:	April 8, 2008
Hearing reconvened:	August 26, 2008
Hearing continued to:	August 27, 2008
	August 28, 2008
	September 15, 2008
Hearing continued administratively to:	October 1, 2008
Hearing record closed:	October 1, 2008

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On May 9, 2005, the Department of Development and Environmental Services (DDES) issued a code enforcement Notice and Order to Appellant Laurie Weaver, finding code violations on a Rural Area-5 Acre (RA-5)-zoned property located at 20515 NE Union Hill Road in the unincorporated area east of Redmond. DDES on February 15, 2006 issued a Supplemental Notice and Order to Ms. Weaver regarding the property, supplementing the found violations. The subject Notices and Orders and their respective appeals are consolidated for appeal consideration. (Hereinafter, "Notice and Order" refers to the aggregate of the two issued Notices and Orders, unless the context indicates otherwise.)
2. Consolidated, the Notice and Order cited Ms. Weaver and the property with the following violations of county code:
 - A. Expansion of an existing kennel, operation of a kennel/cattery and dog training facility without the required conditional use permit, and, alternatively, operation on a residential site of a dog kennel and dog obedience training business that exceeds home occupation standards.

- B. Construction of an accessory kennel structure and construction of a fence over six feet in height without required permits, inspections and approvals. (This violation was stipulated as withdrawn by the charging agency, DDES, and is dismissed herein.)
- C. Conversion of an enclosed horse riding arena structure into a dog training facility without required permits, inspections and approvals.
- D. Grading and fill in excess of 100 cubic yards (58,000 square feet for parking and training areas) without a valid grading permit.

The Notice and Order required correction of the violations by cessation of the dog training and kennel uses and the use of the horse arena and outside training area, or alternatively, obtainment of a conditional use permit for a kennel and dog training facility; obtainment of necessary building permits; and obtainment of a valid grading permit.

3. Appellant Weaver filed appeals of the pertinent Notices and Orders, consolidated as noted above. The consolidated issues on appeal (those remaining after stipulated dismissal of the building/fence permit issue) are as follows:
 - A. Is there operation of a dog kennel and dog obedience training business conducted on the site that exceeds the standards for a home occupation in violation of KCC 21A.30.080?¹
 - B. Is such operation to the extent it is conducted onsite a legal nonconforming use?
 - C. Has a horse riding arena onsite been converted into a dog training facility without necessary permits, inspections and approvals?
 - D. Have grading and fill in excess of 100 cubic yards (58,000 square feet for parking and training areas) been conducted onsite without a required grading permit in violation of KCC 16.82.060?
 - E. Is the County's interpretation and/or application of the zoning code in the Notice and Order arbitrary and capricious, and/or do they constitute an unconstitutional taking and/or a violation of substantive due process?
4. In April 28, 1997, DDES's predecessor agency formally documented the County's acknowledgement of a nonconforming kennel use of the property. There was no counterpart confirmation of a nonconforming dog training use (nor any mention of breeding, grooming or retail uses). In the course of this proceeding, the County stipulated to the existence of nonconforming dog training uses onsite, but limited such stipulation: it disputes any contention that the nonconforming training use is an umbrella allowance of any and all types and extent of dog training activity. The County instead argues that the extant nonconforming dog training right is limited to the type and extent of dog training established by the prior owner/operators, the

¹ The February 15, 2006 Supplemental Notice and Order in charge no. 1 finds a violation of county code by "operation of a dog kennel and dog obedience training business from a residential site that exceeds the standards for a home occupation...." This unfortunately awkward language is common DDES Code Enforcement shorthand for a finding of violation which could more clearly and accurately be expressed as "operation in violation of basic use regulations and in the alternative also not qualifying as a home occupation." It shall be considered as such herein.

DeWitts (see below), which the County asserts was merely incidental to the kennel use. The County contends that since the DeWitts' establishment the Appellant has impermissibly expanded the nonconforming dog training use in violation of the law.

Property Development

5. The property is a rectangular 3.74 acre site on the south side of Northeast Union Hill Road in the unincorporated Redmond area east of Redmond proper. It was originally developed as small farm acreage with a single-family residential farmhouse and outbuildings. Historically set among other cleared farmlands intermingled among wooded parcels, the property is located in an area which has in the past few decades undergone a significant amount of large lot suburban residential development. It is now surrounded by a church site to the east and relatively large lot suburban detached single family residences to the south and west and a few to the north amongst larger parcels.
6. Since 1963, the property has been operated as an animal kennel use in addition to its residential use. In 1963, kennel structures were developed on the site, with the property owned or leased by a party named Schumacher and operated as the Union Hill Kennel.

Redmond Kennels

7. In 1967, the property was purchased by Eddie and Kay DeWitt, who resided in the residence and operated their Redmond Kennels business onsite.² The Redmond Kennels operation consisted of three principal kennel buildings with 91 dog runs approved by the County (and a 150-dog total capacity, apparently doubling up in the runs), and the use of accessory buildings and the exterior grounds. The residence served as the business office. Dog boarding services were offered to the public and the business generally thrived. (A cattery accommodation is also provided, but that is not at issue in the instant proceedings to any significant degree.)
8. The Redmond Kennels use also included the breeding of champion registered Labrador dogs, with an average production of 30-40 pups per year. Stud service was also provided onsite.
9. Dog training was also a line of business conducted onsite, consisting of:
 - A. Basic obedience training (entry level), with accommodations of 5-25 dogs per class.
 - B. Field trial training, often with 15-20 dogs in a class and a "three-blind" exterior training course often utilized.
 - C. Gun dog training, which utilized the site as a base and ranged offsite (prior to the County's imposition of shooting management in the area) into surrounding areas to the south and east prior to their becoming more developed.
 - D. Minor occasions of other types of training, such as contraband drug detection.
10. Training classes consisted of a range of relatively formal organized-series classes and also private one-on-one training. The group classes were conducted as much as two to three times a day, on any day of the week. Training was also conducted on an *ad hoc* basis by Eddie DeWitt, who was a spontaneous and enthusiastic trainer out of pure avocation. In addition to Mr. DeWitt as a trainer, the Kennels consistently employed one full-time experienced dog training employee.

² The DeWitts relocated the business from Redmond proper, where it had been conducted for several years at least.

11. Pet grooming services were also provided, sometimes conducted by a subcontractor who utilized grooming facilities onsite.
12. Minor retail sales of dog food and typical accessory equipment were also conducted.
13. The property's structural array during the Redmond Kennels operation prior to September 2000 consisted of the residence/business office in the northwest portion, southwest of which were a garage, a barn, a shed and other small accessory buildings, including two small kennel-related buildings; the main three-building kennel facilities in the northeastern portion of the property; a gravel entry driveway and informal surfaced and unsurfaced open parking area between the building complexes in the north central portion of the site; and in the southern half of the parcel an open (mostly cleared), gently to gradually sloped grassy area descending to the southwest.
14. Along the northern property line on the Northeast Union Hill frontage is a high (ten foot) cinderblock wall, bracketing the driveway opening, and business signage.
15. Outdoor dog training, of both offsite patrons' dogs and site-bred dogs, was conducted by Redmond Kennels in the northerly interior "courtyard" between buildings, and also in the more open half of the property to the south. (Training was conducted "all over" the exterior of the site.) It was often conducted until 8:00 or 8:30 at night, and sometimes as late as 10:00 p.m.; in seasons without late twilight it was visually aided by use of vehicle headlights (patrons' personal vehicles having been driven into the southern grassy portion as a routine means of parking close to the southerly training area). Training operations were generally constant over the years; they were more than intermittent or merely occasional in frequency.³
16. The DeWitts also engaged in competitive field trials, as professional entrants and amateur entrants at various times. They regularly participated in such trials, as field trial competition by retriever dogs and particularly Labradors was a strong avocation and was also used as a means of promoting their breeding business. In formal competitions, Eddie DeWitt tended to be the trainer and Kay DeWitt the handler. They engaged in North American, regional, and local competitions.
17. Locally, field trial enthusiasts and clubs engage in what are termed "picnic" and "license" field trials, which are competitive events of varying formality. Local club-level "picnic" events involve registration and fees similar to more formal events. During the DeWitts' participation, such local club-level events were often structured so that a portion of the field trial was conducted on the subject property, as one stop or stage in an overall two-day trial event. Such utilization of the property in field trials was fairly constant through the DeWitt years. Attendance onsite at those times could entail parking of as many as 40-50 cars on the site and, as in some of the field trial training onsite, the utilization of blank pistols to simulate gunshot, the projection of "bumpers" (dummy retrieval objects) and of bird carcasses, and use of support training personnel. Screens would be set up as blinds. During such events, as was also common in the field trial training, dogs (those being trained and/or competing and also dogs present but not participating), would engage in regular loud barking. As is the ethic in field trial training,

³ With respect to resolving the somewhat conflicting testimony about the level of training conducted on the property during the Redmond Kennels regime, the Examiner finds the more persuasive testimony and the preponderance of the credible evidence to show substantial and continuous training conducted by Redmond Kennels throughout its tenure on the property. The more persuasive testimony is given by those with much more regular and far more direct contact, observation and knowledge of the Redmond Kennels operation.

barking is not repressed except in the rare instances of a dog being “out of control” with excessive barking.

18. Due to ill health, advancing age and the passing of Kay DeWitt in the winter of 1999, the DeWitts’ operation of Redmond Kennels came to a gradual cessation in the following sequence: The last bred litter was whelped in September of 1999. (Puppies are kept for eight weeks weaning afterwards, prior to being handed over to their purchasers.) Mr. DeWitt relocated his residence from the site in November of 1999, but the Kennels continued to operate. The last County animal inspection conducted under the DeWitt ownership was performed on December 28, 1999, and noted the presence of 50-60 boarded dogs. Dog training conducted by Mr. DeWitt and by an employee trainer continued onsite until April 2000.
19. The property and business were sold via a trust to Appellant Weaver on September 1, 2000. Ms. Weaver now conducts the successor business as A Canine College (hereinafter “Canine College”), a business name which also attaches to other, off-site operations.

Appellant’s Canine College Use

20. Ms. Weaver conducts the kennel boarding operation similarly to that previously, with some of the dog training different from the Redmond Kennels offerings. The kennel boarding operations continue. The Canine College training offerings are as follows:
 - A. Several levels of obedience training.
 - B. Competition obedience training, which is a formal competitive sport.
 - C. Agility training, also a competitive sport.
 - D. “Foundation work” for titleable dog sports.
 - E. Training of handlers in three levels of obedience training.
21. Classes are offered as class series in group, semi-private and private lesson formats.
22. As well as conducting her business of dog training onsite, Ms. Weaver trains as a hobby with friends and family.
23. Appellant Weaver made several notable facility improvements after her purchase of the property in 2000 and commencement of the Canine College operation:
 - A. Construction of an enclosed arena building, with dimensions of 80 feet by 60 feet in footprint, for a total footprint of 4,800 square feet. The horse arena was built in the northern part of the east side of the property, south of the existing main kennel structures. Its appearance is generally of a typical metal-clad agricultural/industrial building. The building permit obtained by Ms. Weaver in 2002 for the structure (permit B02M1110) states that it is for her personal horse riding arena use. No mention of dog training usage is indicated in the permit history. The horse arena added 4,800 square feet of impervious surface to the property, a substantial increase.
 - B. Substantial earth grading was conducted in the southern, open exterior portions of the site, significantly consisting of cut and fill and resultant benching of the previously gradually sloping southern portion so that it now consists in large part of two relatively flat large benched areas. The fill slopes for such benching show fill depths of as much as three to four feet in the southerly fill slopes.

- C. In addition, filling was conducted in or adjacent to the southwest portion of the previously existing driveway/parking area in the northern courtyard between the two building complexes to expand the surfaced parking area. However, the record presented regarding parking improvements and creation of new impervious ground surface is insufficient on which to base findings of fact regarding parking area and impervious ground surface expansion. (The Examiner notes that the expansion category established by KCC 21A.32.065.A.1.c is stated simply as “parking,” with no elaboration or distinction regarding improvement level, if any; formality (such as by marking); etc.) The evidence presented is such that no solid comparison is able to be made regarding past and present number of parking spaces or dedicated areas (formal or informal), and the creation of new impervious ground surfaces.)
- D. Although the evidence is circumstantial (a formal engineering calculation not having been entered into the record), the preponderance of the evidence persuasively demonstrates that the grading activity in the open southern part of the site (the benching of the outdoor areas noted above) greatly exceeded the 100 cubic yard threshold established by KCC 16.82.051.C.1 for the requirement of a grading permit.
- i. One hundred cubic yards is equal to 900 cubic feet.
 - ii. With a depth of two feet, a flattened cube equivalent to 900 cubic feet of volume is only approximately 21.22 feet by 21.22 feet in footprint, or alternatively for example, coverage areas of 15 feet by 30 feet or 20 feet by 22.5 feet.
 - iii. With a one-foot depth, the footprint would be a square of 30 feet by 30 feet, or alternate footprints for example of 25 feet by 36 feet or 20 feet by 45 feet.

Examination of the photographic evidence of the grading onsite, compared for scale with visible common objects such as fencing, rubbish canisters and human beings, and compared to a topographical site plan depicting the pre-grading topography, show by the preponderance of the evidence that under the Appellant’s ownership grading was conducted in the southern open portion (generally, the benched areas) well in excess of the above-noted example areas and volumes and therefore well in excess of the 100 cubic yard threshold beyond which a grading permit is required.

- 24. No grading permit was obtained for the subject grading activity.
- 25. There are exceptions to grading permit requirements. [See, generally, KCC 16.82.050 and .051] No specific claim of exception is made by the Appellant, and no exception is apparent. (Also see conclusion 16 below.)
- 26. The dog training activity onsite increased in frequency and intensity after Ms. Weaver’s purchase, with appreciable increases in frequency and noise observed first in September of 2002 and further in the spring of 2004, with observations that outdoor training activities had been ramped up as well as the number of patrons’ vehicles being accommodated onsite.
- 27. The Canine College training activities are conducted primarily in two locations onsite, within the enclosed “horse arena” building and on the graded benched areas in the southern portion of the site. Training classes are conducted two to three times a day, seven days a week, with 20-30 dogs at a time quite common.

28. Occasionally, Canine College brings in outside expert trainers to conduct classes. In addition, Ms. Weaver rents the facilities to other training operations for their use.
29. As noted above, nonconforming kennel and dog training uses onsite have been either formally recognized previously by the County as noted, or stipulated in this proceeding, respectively (albeit with some qualification of the training stipulation). As a general recitation, when established in 1963 the original kennel use on the property was permitted under the county's zoning regulations at the time. As relocated to the site in 1967, the Redmond Kennels training uses and other aspects of the Redmond Kennels uses, including boarding, breeding, grooming, and retail sales of a minor nature in addition to the training, were also permitted outright under the county's zoning regulations. Since that time, in or around 1993, well prior to the Canine College assumption of the business and property, the zoning code was amended to require a conditional use permit for kennels, with dog training likewise required to have a conditional use permit under a "specialized instruction school" use classification. In 2004, the zoning code was amended further to classify "dog training facility" as a separate use classification, also required to be under the auspices of a conditional use permit. [See, *e.g.*, KCC 21A.08.050] The establishment of the Union Hill Kennels and Redmond Kennels uses, with all of the Redmond Kennels permutations noted including dog training, predated the requirement of a conditional use permit.

Vegetation Clearing

30. Charges of violation were leveled during hearing that impermissible clearing had been conducted on the property by cutting down fir trees along the east property boundary. Aside from the fact that no specific finding of such violation was entered in the Notice and Order at issue in this case (no charges of violation of *clearing* regulations was levied), the preponderance of the evidence in the record shows in any case that such trees were on the adjacent property to the east and therefore offsite of the subject property, except perhaps for overhanging branches. Any clearing regulations which may have pertained to such trees were applicable to the adjacent property, not the subject property.

CONCLUSIONS:

1. The Appellant's charges of arbitrary and capricious enforcement and unconstitutional takings/substantive due process claims shall not be decided by the Examiner. First, the Examiner has no authority to grant any equitable relief based on assertedly improper or unfair administration of the permit process. The Examiner is generally limited to applying law duly enacted by statute, ordinance and rule, or set forth in case law, and has no authority to adjudicate common law issues such as claims in equity. Equity claims would instead have to be brought in a court of general jurisdiction, the Superior Court. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 689 P.2d 1084 (1984)]
2. Also, the Examiner has very limited jurisdiction over constitutional issues, essentially limited to reviewing claimed regulatory takings arising from imposition of specific mitigation measures and/or permit conditions in development permit cases, and in so doing observing the *nexus* and proportionality requirements established in case law governing regulatory takings/substantive due process. The Examiner will not venture so far as to decide whether simple code enforcement under applicable local police power regulation constitutes a taking; that claim may be taken to a suitable venue as a facial challenge to land use regulation in general.

Nonconforming Use

3. In considering the continuity of nonconforming uses, the business name(s) utilized by an operation and any changes thereto are immaterial. Similarly, nomenclature changes in signage and advertising are immaterial. It is the fundamental use of the property which benefits from the nonconforming use right, unaffected by changes in guise of business or ownership. Nonconforming use property rights attach to the land, not to any person or entity.
4. Similarly, rental of onsite facilities to conduct the same use, sublease to other instructors, utilization of visiting instructors and other experts, etc., are all permissible in the operation of a nonconforming use (and a standard permitted use for that matter). The comparison to be made here is that it is common for churches to invite visiting preachers, academic institutions to present visiting lecturers and visiting faculty, etc., and for such institutions to rent out meeting space for similar functions or charge an admission fee.
5. Informal practice activities conducted by patrons without formal training instructors present is similarly permissible as incidental to training, just as school athletic facilities may be used informally for athletic activities (*e.g.*, light practice, pickup games, scrimmages, etc.).
6. Similarly, informal competitions, *i.e.*, unsanctioned events, may be conducted as training opportunities and/or as hobby-level and interest group-level activity, similar to scrimmages and intra-squad games of formal athletic teams, etc. Aside from being generally incidental, they are also in this case similar to the field trial competition stages held on the property under the DeWitt tenure.
7. The boarding kennel, breeding, training, grooming and accessory retail sales uses established on the property by the DeWitts in their operation of the Redmond Kennels (if not already established under the Union Hill Kennels) were lawfully established under then-applicable land use regulations and became nonconforming uses upon the requirement of a conditional use permit(s) for such uses.
8. The uses established by Redmond Kennels operated generally continuously from 1967 through 1999 and into the early part of 2000. There is no showing in the record that the nonconforming use through the entire tenure of the DeWitt ownership and operation of Redmond Kennels on the property was discontinued to any extent constituting abandonment which would relinquish nonconforming use rights. (It should be noted that the burden of proof of discontinuance or abandonment of a nonconforming use rests on the party asserting such abandonment or discontinuance, which in this case would be the County. [*University Place v. McGuire*, 144 Wn. 2d 640, 647, 30 P.3d 453 (2001), citing *Van Sant v. City of Everett*, 69 Wn. App. 641, 647, 849 P.2d 1276 (1993)]; also see conclusion 11 below)
9. The purchase and resumption of business operations on the site by Appellant Weaver dba Canine College entailed no discontinuance or abandonment which would threaten the nonconforming use right. Aside from the period of suspension between the Redmond Kennels close of operation and commencement of the Canine College operation having been well under a year (the discontinuance threshold is twelve months under county code; see KCC 21A.32.045 and Conclusion 11 below), it should be noted that nonconforming use discontinuance is not effected by mere temporary cessation of operation such as a temporary suspension of business for economic reasons or reorganization, a hiatus for personal reasons, etc. There must be an evident

intent to abandon for the nonconforming use right to have been relinquished. [*Andrew v. King County*, 21 Wn. App. 566, 571, 586 P.2d 509 (1978)]⁴

10. With two exceptions, the training operations conducted by Canine College, though qualitatively different in some respects from those conducted by Redmond Kennels, are not so dissimilar as to constitute an expansion or a different use which is not protected under the established nonconforming use right. The two exceptions are discussed below. Otherwise, two basic principles hold: First, some ebb and flow is a normal phenomenon of business activity; fluctuations and variations in response to markets and business choice are a normal expectation and those evident here with Canine College do not present the characteristic of being significantly “different in kind” from those typical of Redmond Kennels. [*Meridian Minerals v. King County*, 61 Wn. App. 195, 209, 810 P.2d 31 (1991)] Second, intensification of the dog training uses is permissible; the dog training use may be intensified as to level of operation and patronage within the existing and previously used facilities, *i.e.*, the business may be operated to the capacity of the existing and previously used business facilities. Such intensification within the existing and previously used business facility, as opposed to expansion, is permissible in the maintenance of nonconforming use rights. [*University Place v. McGuire*, above at 649; *Keller v. Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979)]
11. Expansion is a different matter. Under Washington case law, there is no common law right to expansion of a nonconforming use. [*University Place v. McGuire* and *Keller v. Bellingham*, above] However, local governments are free to establish their own standards governing nonconforming uses, including their discontinuance, modification and expansion. [*Rhod-a-zalea v. Snohomish County*, 136 Wn.2d 1, 8, 959 P.2d 1024 (1998)] King County has done so, in Chapter 21A.32 KCC. The County has set a discontinuance threshold of twelve months, beyond which discontinued nonconforming uses may not be resumed. [KCC 21A.32.045] “Discontinuance” is not specially defined in the zoning code and there is no requirement that nonconforming uses be abated/phased out more stringently than by the code’s undefined “discontinuance” provisions. [See footnote 4] “Modifications” of nonconforming uses, the definition of which is also not set forth specially in the zoning code and which are not expressly at issue in this proceeding, are permitted if reviewed and approved through DDES’s formal code compliance review process, with approval subject to certain general decision criteria. [KCC 21A.32.055, citing KCC 21A.42.030, and KCC 21A.32.075] Expansions of nonconforming uses are permitted under limited auspices and/or through formal permit processes, again subject to certain general approval criteria. Maximum ten percent (cumulative) expansions of building square footage, impervious surface, parking and building height may be approved through the KCC 21A.42.030 code compliance review process.⁵ Under certain circumstances, greater expansions of those types and other types of expansions may be approved through the special use permit review process, while the remainder must undergo the conditional use permit process. [KCC 21A.32.065 and .075]

⁴ No showing of intent is necessary if the applicable local zoning scheme (see Conclusion 11) mandates termination of nonconforming use rights after a use has been unintentionally vacated rather than intentionally abandoned. [*Choi v. City of Fife*, 60 Wn. App. 458, 803 P.2d 1330, review denied 116 Wn. 2d 1034, 813 P.2d 5A3, (1991)] But that is not the established regulatory scheme in King County; since “discontinuance” is not defined specially in the zoning code to mean anything other than as it has been articulated in the case law, the actuality of discontinuance must be addressed under the common law treatment. [*Meridian Minerals v. King County*, above at 206] Pursuant to *Andrew v. King County*, above, intent would therefore have to be shown.

⁵ The Appellant, and to some extent the County, have directed a good deal of their argument to whether the alleged expansions of the nonconforming use fall under or exceed the ten percent thresholds. The issue is not directly relevant to the consideration of the appeal; what type of formal review is necessitated for compliance of any found expansions is not a direct concern of the Examiner. (See Order no. 4 below.)

12. The first expansion beyond the established nonconforming use right is the conversion of the horse arena to dog training use. The new horse arena building, erected under the Canine College ownership, is a new dog training facility onsite. It does not benefit from the established nonconforming use right but instead constitutes a significant structural expansion of the use. Expansion under certain circumstances and under certain review criteria is permitted under county code, as noted above. Such expansion must gain the prior authorization of the County through formal review, in some cases requiring official permitting. No such County authorization has been obtained in this case for the conversion of the horse arena structure to dog training uses. The charge of zoning violation by such conversion is therefore correct and is sustained.
13. The second expansion is the significant grading improvement of the now-benched portions of the southern exterior grounds. While training could have been conducted in such area on its then-existing topography as a business continuation, and indeed allowable intensification, of the lawful nonconforming dog training use established by the DeWitts, the significant improvement of such area to provide a more uniform training surface constitutes an impermissible expansion. In other words, the fact that the current type of training usage of that area has been accompanied by its significant development improvement (which improvement also appears to have been necessary to the type of training now being conducted, the agility training) renders it a substantial expansion of the nonconforming use. The improvement by extensive grading significantly exceeds “existing facility” usage by the nonconforming use; by such improvement, the Appellant changed the area to one constituting expanded facilities.
14. In summary regarding the exterior south grounds, the improvement of such area with the newly created benching by significant grading for agility training constitutes an impermissible expansion of the nonconforming use. To be permitted, it must gain formal approval through the County’s nonconforming use expansion provisions, *i.e.*, through the code-established formal review and/or permitting processes required by Chapter 21A.32 KCC. That formal review and/or permitting of such area was not sought by the Appellant and has not been conducted through to approval. Therefore, the expansion of the dog training facilities by the significant grading of the south benched areas is an unpermitted expansion of the nonconforming use. The pertinent finding of operation in violation of the zoning code is correct from this standpoint as well, and the Notice and Order is sustained accordingly.
15. As noted, the fence and building permit violation issue was stipulated as withdrawn and shall be dismissed.

Grading

16. The Appellant argues that the County’s charge of grading permit violation neglects to account for exceptions to the permit requirement, essentially arguing that the County is obligated to review eligibility for such exception before finding a permit violation. While responsible regulatory administration and enforcement would reasonably be expected to recognize any obvious or apparent exceptions before charging violation, fundamentally the burden for proving exception to a regulation falls on the party making the claim of exception. Here the Appellant has not made any specific claim of exception. As noted above, none is apparent either. The Appellant attempts to shift the burden of proof of exception (or, more to the point, of non-exception) to the County, which is not legally correct and is not accepted.

17. The grading of the benched areas exceeded the permit threshold requirements in county code. No grading permit was obtained for such grading activity. Accordingly, the Notice and Order charge of violation by failure to obtain a grading permit is correct and is sustained.
18. The Appellant next argues that there has been “no harm” shown by the subject grading activity, and contends that therefore the requirement of a grading permit is “disproportional” to the harm caused and may not be imposed. This theory, a relatively novel argument in this examiner’s case experience, is essentially a “no harm-no foul” (and therefore “no permit”) contention resting on the notion that land use regulation is unenforceable unless property use and development is shown to cause actual harm, and is misdirected. The Examiner notes that the charge of violation with respect to grading is that grading was conducted without a grading permit, not that the grading caused harm. To the extent that the Appellant’s argument is directed at the county code requirement of grading permits for grading activity which causes “no harm,” it is tantamount to a facial challenge to the County’s police power regulation of grading. The Examiner has no authority to adjudicate facial challenges to county code and the police power. (To the extent that the argument may constitute a claim in equity, similarly the Examiner has no jurisdiction to adjudicate it on that basis, as previously noted.)
19. The Appellant also decries an anticipated onerous burden of grading permit review in her claims that the permit requirement is “disproportional” to the alleged harm. This argument is premature: Any inappropriate onerousness encountered in permit review can be taken up with the applicable review authorities and perhaps by seeking relief in the proper forum(s) for such complaints, at the time it is encountered. Feared onerousness does not preempt fundamental permit requirements.

Summary

20. In summary:
 - A. The charge of violation of fundamental land use regulations is shown to be incorrect with respect to the operation of the nonconforming use kennel, training, etc. operation, except with respect to the impermissible dog training expansions by conversion of the horse arena and improvement of the southern portion benched areas. Those two aspects of the use must be ceased until, if desired to be operated, they are brought into compliance by obtainment of the necessary formal review approvals and/or permitting for nonconforming use expansions as required by county code.
 - B. The charge of violation by conducting grading and fill without a grading permit is correct and is sustained.
 - C. The fence/building permit violations found by the Notice and Order are stipulated as withdrawn and shall be dismissed.

DECISION:

Found violation no. 2 regarding fence and building permits is **DISMISSED** as stipulated by Respondent DDES.

The APPEAL is GRANTED IN PART, with respect to recognition of the fundamental nonconforming use rights of kennel and dog training uses on the property as more fully described above, and the Notice and Order is REVERSED in such regard.

With respect to the impermissible expansion of the nonconforming use by conversion of the horse arena and by development grading to create the benched areas utilized for agility training in the southern portion of the site, and with respect to grading without a grading permit, the APPEAL is DENIED and the Notice and Order is SUSTAINED, provided that the COMPLIANCE SCHEDULE for correction is REVISED as stated in the following order.

ORDER:

1. Schedule a grading permit pre-application meeting with DDES *by no later than August 7, 2009*.
2. Submit a complete grading permit application to DDES *by no later than September 8, 2009*. After submittal, all pertinent timeframes and stated deadlines for the submittal of additional information, response comments, etc., if any, shall be diligently observed by the Appellant through the permit issuance, obtainment and final inspection approval.
3. DDES is authorized to grant deadline extensions for any of the above requirements if warranted, in DDES's sole judgment, by circumstances beyond the Appellant's diligent effort and control. DDES is also authorized to grant extension for seasonal and/or weather reasons (potential for erosion, other environmental damage considerations, etc.).
4. *By no later than August 14, 2009*, dog training activities within the horse arena structure and on the graded benched areas of the southern portion of the site shall be ceased in their entirety. Any use of such areas for dog training or any other kennel/training purposes shall not be recommenced until it is granted DDES formal review/permit approval for nonconforming use expansion as required under county code and applicable law.
5. No fines or penalties shall be assessed by DDES against Ms. Weaver and/or the property if the above compliance requirements and deadlines are complied with in full (noting the possibility of deadline extension pursuant to the above allowances). However, if the above compliance requirements and deadlines are not complied with in full, DDES may impose penalties as authorized by county code retroactive to the date of this decision.

ORDERED July 10, 2009.

Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding Code Enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly

commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE JANUARY 8, 10, 29 AND FEBRUARY 12, 2007, MARCH 22, 2007, APRIL 8, 2008, AUGUST 26-28, 2008 AND SEPTEMBER 15, 2008 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0400741.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Jina Kim and Erroll Garnett, representing the Department; William Crittenden, representing the Appellant, Laurie Weaver, the Appellant; Allan Bakalian, representing the Intervenors; David Kress, the Intervenor, Colette Kress, Donald Crace, Cameron Towne, Scott Dowling, Lance Bowman, JoAnn White and Christine Wheeler.

The following Exhibits were offered and entered into the record:

- | | |
|--------------------|---|
| Exhibit No. 1 | DDES staff report to the Hearing Examiner for E0400741 |
| Exhibit No. 2 | Copy of the Notice & Order issued May 9, 2005 |
| Exhibit No. 3 | Copy of the Notice and Statement of Appeal received May 19, 2005 |
| Exhibit No. 4 | Copy of the Supplemental Notice & Order issued February 15, 2006 |
| Exhibit No. 5 | Copy of the Amended Notice and Statement of Appeal received February 24, 2006 |
| Exhibit No. 6 | Copies of codes cited in the Notice & Order |
| Exhibit No. 7 | Copy of the violation letter to Laurie Weaver from Officer Garnett sent August 23, 2004 |
| Exhibit No. 8a-f | Photographs taken by Officer Garnett on August 26, 2004 |
| Exhibit No. 9 | Copy of the violation letter to Laurie Weaver from Officer Garnett sent September 21, 2004 |
| Exhibit No. 10 | Copy of a letter to Robert N. Munn from Kenneth Dinsmore of DDES dated April 28, 1997 |
| Exhibit No. 11 a-h | Photographs from the Assessors's Office and Walker & Associates dated April 25, 2004 |
| Exhibit No. 12 a-n | Copy of the Report and Decision for L93VA006 dated May 12, 1993 with attachments |
| Exhibit No. 13 | Copy of a letter from Laurie Weaver stating her intent of the horse arena as being used for personal use, dated July 10, 2002 |
| Exhibit No. 14 a-e | Copy of an email with photographs (4) to Erroll Garnett and Joe Miles from David Kress dated March 23, 2006 |
| Exhibit No. 15 a-o | Copy of letter to Erroll Garnett from David and Colette Kress dated June 6, 2005 with a copy of the calendar of events and information for Canine College; Email to Erroll Garnett from David Kress dated June 6, 2006 with attached exhibits 15h – 15o |
| Exhibit No. 16 a-f | Photographs taken by the Kress's on February 25, 2006 of activities on Weaver property |
| Exhibit No. 17 a-b | Photographs of access road on Weaver property |
| Exhibit No. 18 | Copy of the site plan for Weaver property |
| Exhibit No. 19 | Copies of the application for a permit for the pole barn later known as the horse riding arena |
| Exhibit No. 20 | Letter to Robert Munn from Kenneth Dinsmore dated April 28, 1997, statement from Paul Shoemaker dated August 5, 2005; letter to Laurie Weaver from Edward DeWitt (past owner of Redmond Kennels) and Christine Wheeler, Daughter of Edward |

	DeWitt dated July 7, 2005; email to Laurie Weaver from Mary L. Hallowell dated July 28, 2005; letter from Fred Francis dated May 29, 2004; email to Laurie Weaver from Ron & Cyrie Harris dated October 17, 2005; letter from Gertrude & Horace Olsen dated October 15, 2005; copy of Sammamish Valley News article on Redmond Kennels dated May 7, 1980; IAMS Breeder Report on former owners Eddie & Kay DeWitt dated winter 1988
Exhibit No. 21	Copy of full size site plan submitted by Ms. Weaver, dated February 17, 1999
Exhibit No. 22	Aerial photograph from Walker & Associates dated October 7, 2000 of the Weaver property
Exhibit No. 23	Copies of inspection reports and business license for Redmond Kennels
Exhibit No. 24	Aerial photograph from King County of Weaver property dated January 5, 2007
Exhibit No. 25	Letter to Erroll Garnett from David Kress dated July 5, 2005
Exhibit No. 26 a-q	Photographs taken by David Kress of different activities taking place on Weaver property
Exhibit No. 27 a-d	Pages from Ms. Weaver's web site indicating training offered
Exhibit No. 28	Various Yellow Pages ads for various kennels
Exhibit No. 29	Copy of Gun-Shy Ridge property description
Exhibit No. 30	Annotated exhibit no. 29 to indicate where Mr. Peck's home is
Exhibit No. 31 a-i	Nine photographs taken of various areas of Weaver property
Exhibit No. 32	Copy of the deed for Irene James' property

The following Exhibits were entered into the record on January 29, 2007:

Exhibit No. 33	Affidavit of Don Crace dated June 23, 2005
Exhibit No. 34	As-built of Weaver property
Exhibit No. 35	Photograph of parking area on Weaver property
Exhibit No. 36	Four photographs from an email in annotated form dated January 27, 2007
Exhibit No. 37	Two photographs from an email in annotated form dated January 27, 2007
Exhibit No. 38	Letter to Laurie Weaver from Daniel J. Frohlich, Elder on behalf of the Session of Celebration Presbyterian Church dated July 26, 2005 regarding the setback variance
Exhibit No. 39	Photograph taken in May 2005 of dog training area
Exhibit No. 40	Photograph of Select Electric van installing a light upon a newly erected pole
Exhibit No. 41	Photograph of side area of parking lot
Exhibit No. 42	Video of dogs being trained and/or waiting
Exhibit No. 43	What is AKC Agility? page taken from the American Kennel Club's web page
Exhibit No. 44	Agility page taken from the American Kennel Club's web page
Exhibit No. 45	A more detailed description on agility training from the American Kennel Club's web page
Exhibit No. 46	Photograph showing area beyond the open garage door

The following Exhibits were entered into the record on February 2, 2007:

Exhibit No. 47	1997 aerial photo of Weaver property
Exhibit No. 48	Amalgamation of exhibit 21 d & 21 g
Exhibit No. 49	(Not used)
Exhibit No. 50	(Not used)

The following Exhibits were entered into the record on August 28, 2008:

Exhibit No. 51	Photograph of Christine Wheeler with dog holding a bumper dated around 1952
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Exhibit No. 52	Page from the Sammamish Valley News dated October 8, 1969 showing an advertisement for training dogs at his kennel
Exhibit No. 53	Description of Labrador Retrievers from Wikipedia
Exhibit No. 54	Article from Wikipedia on field trial events
Exhibit No. 55	Field Trial Rules and Standard Procedure for Retrievers from the American Kennel Club
Exhibit No. 56	Regulations and Guidelines for AKC Hunting Tests for Retrievers dated June 1, 2005
Exhibit No. 57	Photograph of a trophy case for field trials that Mr. DeWitt received
Exhibit No. 58	1984 National Championship Stake advertisement from the Canadian Kennel Club
Exhibit No. 59	1988 National field trial pamphlet listing Kay DeWitt
Exhibit No. 60	Retriever Field Trials for 1985-1990 pamphlet showing the different wins along with a photograph of Kay DeWitt with Ironwood Peggy
Exhibit No. 61	Photographs depicting Mr. DeWitt with Eddie Bauer and Eddie Bauer with Kay DeWitt dated June 1973
Exhibit No. 62	Excerpt from the book titled The Legend of Eddie Bauer
Exhibit No. 63	Photograph of Eddie and Kay DeWitt receiving a puppy from Scotland
Exhibit No. 64	Article from the Sammamish Valley News dated May 7, 1980 commemorating Redmond Kennels 15th year anniversary
Exhibit No. 65	1982 Guinness book of World Records listing Eddie DeWitt's dog Wanapum Lucky YoYo as being the highest price paid for a dog
Exhibit No. 66	An article listing Kay DeWitt as Breeder of the Year from the Professional Retriever Trainers Association of America
Exhibit No. 67	Photograph of Kay DeWitt with her dog Wanapum Sheba taken sometime in the 1960s
Exhibit No. 68	An article from IAMS Breeder dated Winter of 1988 titled Redmond Retrievers: A Growing Breed
Exhibit No. 69	Litter records from the DeWitt's kennel dated September 1, 1978
Exhibit No. 70	Photograph of Wanapum Lucky YoYo from the Retriever Field Trial News dated May 1972
Exhibit No. 71	Article from Redmond Kennels about the training they offer along with an article from Retriever Field Trial News dated November 1972
Exhibit No. 72	Photographs of Redmond Kennels grooming shop
Exhibit No. 73	Flier from Redmond Kennels grooming shop
Exhibit No. 74	Ad for Redmond Kennels
Exhibit No. 75	Photograph of fence around Redmond Kennels
Exhibit No. 76	Photographs showing barrier created by Redmond Kennels for security and noise buffer
Exhibit No. 77	Letter to Frank Everett (former owner of the kennel) from Eddie and Kay DeWitt dated November 29, 1996 re: kennel being grandfathered
Exhibit No. 78	Kennel license reissuance dated January 1, 1973 with an inspection record
Exhibit No. 79	Interview with Eddie DeWitt in 1998 by Canine Country Club
Exhibit No. 80	Litter record of SeaTac's Storm'n Norman and Avalanche Lily dated July 9, 1994
Exhibit No. 81	Death Certificate for Kay DeWitt
Exhibit No. 82	Photographs of Eddie DeWitt at Kay DeWitt's funeral
Exhibit No. 83	Inspection Report of Redmond Kennels by Christine Wheeler dated January 15, 2001
Exhibit No. 84	Invoice for boarding from Redmond Kennels dated January 10, 2000
Exhibit No. 85	Photograph of Eddie DeWitt
Exhibit No. 86	Photograph of Eddie DeWitt taken around 2001
Exhibit No. 87	Photograph of Eddie DeWitt at Merrill Gardens taken June 2002

- Exhibit No. 88 Order appointing Christine Wheeler to be Eddie DeWitt's guardian dated November 26, 2002
- Exhibit No. 89 Photograph of Eddie DeWitt at his Granddaughter's wedding

The following Exhibit was entered into the record on August 27, 2008:

- Exhibit No. 90 Posting from the Tacoma Retriever Club dated April 3-5, 1998

The following Exhibits were entered into the record on August 26, 2008:

- Exhibit No. 91 Photographs of Mr. Bowman and Mr. DeWitt
- Exhibit No. 92 Registration cards from Canine College
- Exhibit No. 93 Copies of checks from Yuppy Puppy Doggy Day Care Canine College
- Exhibit No. 94 Warranty Deed from Chicago Title Insurance Company
- Exhibit No. 95 CD showing hunting practice and tests on water and land
- Exhibit No. 96 CD showing rural character, obedience competition, agility and field trials
- Exhibit No. 97 Photographs showing different homes with agility equipment
- Exhibit No. 98 Nine pages of different dog competitions that can be given
- Exhibit No. 99 Chart showing aspects of obedience, agility and hunting training

The following Exhibit was entered into the record on August 28, 2008:

- Exhibit No. 100 Invitation to Eddie DeWitt's birthday celebration

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